

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY LEWIS JONES, T53643,

Plaintiff,

v.

M. SANDOVAL,

Defendant(s).

Case No. [19-cv-05981-CRB](#) (PR)

**ORDER GRANTING PLAINTIFF'S  
MOTION TO VOLUNTARILY DISMISS  
WITHOUT PREJUDICE**

(ECF Nos. 18 & 22)

Plaintiff moves to voluntarily dismiss this action without prejudice following defendant's motion for summary judgment on grounds that plaintiff failed to properly exhaust available administrative remedies before filing suit, as required by 42 U.S.C. § 1997e(a). Plaintiff seeks dismissal without prejudice so he can refile after properly exhausting under § 1997e(a).

It is well established that a plaintiff has the absolute right to dismiss without prejudice his or her action by filing a notice of dismissal "at any time before service by the adverse party of an answer or of a motion for summary judgment." Fed. R. Civ. P. 41(a)(1). But after service of an answer or of a motion for summary judgment (and if no stipulation of dismissal is obtained), the plaintiff must obtain court approval to dismiss and the court must consider whether the dismissal should be with or without prejudice. See Fed. R. Civ. P. 41(a)(2); Hamilton v. Firestone Tire & Rubber Co., 679 F.2d 143, 145 (9th Cir. 1982).

Under the law of the circuit, a successful motion for summary judgment for failure to properly exhaust available administrative remedies under § 1997e(a) results in a dismissal without prejudice to refiling after properly exhausting. See Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) ("If the district court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice."), overruled on other grounds by Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014) (en banc). The voluntary dismissal

without prejudice plaintiff seeks here so he can refile after properly exhausting consequently appears both just and proper. Plaintiff's motion (ECF No. 22) for voluntarily dismissal without prejudice is GRANTED and the instant action is DISMISSED WITHOUT PREJUDICE.

The clerk is instructed to close the file and terminate all pending motions (see ECF No. 18) as moot.

**IT IS SO ORDERED.**

Dated: July 23, 2020

A handwritten signature in black ink, appearing to read 'C. R. Breyer', is written over a horizontal line.

CHARLES R. BREYER  
United States District Judge